IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

EDGARDO RIVERA BORRERO,

Plaintiff

v.

GLADYS RIVERA CORREA, et al.,

Defendants

CIVIL 98-1268 (SEC)

MAGISTRATE'S REPORT AND RECOMMENDATION

On March 11, 1998, plaintiff pro se Eduardo Rivera Borrero filed a civil rights action pursuant to 42 U.S.C. § 1983 against Gladys Rivera Correa (Director of Inmate Classification for the Administration of Corrections), Sarah Torres (Correctional Services of Puerto Rico Counselor) and José L. Maldonado (Director and President, Administration of Corrections Classification Committee). Plaintiff alleges that he is being held in medium security which caused and continues to cause him and his family mental anguish, thus violating his liberty rights. Plaintiff asks the court to address the civil rights violations against his person and order the Administration of Corrections to relocate him to minimum security. (Docket No. 2.)

On December 7, 1998, defendants filed a motion to dismiss the complaint pursuant to the Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief could be granted. (Docket No. 21.) Defendants seek dismissal on the grounds that

they are entitled to the defense of qualified immunity, that plaintiff has failed to state a claim under 42 U.S.C. § 1983, and that claims for monetary damages are barred by the Eleventh Amendment of the United States Constitution.

On December 23, 1998, petitioner filed "Moción en oposición de desistimiento" (plaintiff's opposition). (Docket No. 24.) Plaintiff reiterates his relocation to medium security is a violation of his rights because the procedure followed by the institution is arbitrary and therefore represents a violation to his civil rights. Petitioner also alleges that his relocation to medium security, when he should be in minimum security, is the result of applying an "ex post facto" law and a bill of attainder in violation of U.S. Const. art. 1, § 9, cl. 3. Petitioner contends that this court should not dismiss the complaint because defendants did not act according to law and refused the plaintiff his basic constitutional rights by acting arbitrarily, capriciously and with full knowledge of the facts.

Plaintiff further contends his complaint should not be disregarded because defendants have not complied with the court's order to submit Corrections Administration Inmate Classification Manuals as well as any other applicable memorandums pertaining to inmate classification procedure.

On October 14, 1999, defendants submitted a reply to plaintiff's opposition (Docket No. 34) informing the court that on January 21, 1999 defendants submitted the documents requested. Defendants also argue that plaintiff amended his original pleadings in his

"Moción en oposición de desistimiento," in violation of Rule 15 of the Federal Rules of Civil Procedure.

ANALYSIS

The standard for assessing the adequacy of a civil rights claim, when confronted with a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b), is whether, accepting the factual allegations in the complaint as true, and construing those facts in the light most favorable to the plaintiff, the pleading shows any facts which could entitle the plaintiff to relief. See Gooley v. Mobil Oil Corp., 851 F.2d 513, 514 (1st Cir. 1988). When a plaintiff complaining of civil rights violations is representing himself, his complaint must be read with an extra degree of solicitude. See Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991). A motion to dismiss a *pro se* complaint filed pursuant to 42 U.S.C. § 1983 will only be granted if "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'" Haines v. Kerner, 404 U.S. at 520-21 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also Rockwell v. Cape Cod Hosp., 26 F.3d 254, 255 (1st Cir. 1994).

I. MEDIUM CUSTODY TO MINIMUM CUSTODY

It is sufficiently well settled that certain terms of confinement may trigger a violation of the Eighth Amendment, see Hutton v. Finney, 437 U.S. 678, 685 (1978). However, in

general, plaintiff has no right to dictate the classification of his confinement, particularly if the condition he suffers under is "within the normal limits or range of custody which the conviction has authorized the State to impose." Sandin v. Conner, 515 U.S. 472, 478 (1995); Meachum v. Fano, 427 U.S. 215, 225 (1976). Agents of prison officials in general do not violate the Eighth Amendment if such actions are the result of a legitimate penal interest. See Whitley v. Albers, 475 U.S. 312, 321-22 (1986); Collazo León v. United States Bureau of Prisons, 51 F.3d 315, 317 (1st Cir. 1995).

Plaintiff finds himself under the custody of the Puerto Rico Administration of Corrections in medium security custody. He was sentenced to 108 years for committing murder in the first degree P.R. Laws Ann. tit. 33, § 4001, resistance or obstruction of public authority P.R. Laws Ann. tit. 33, § 4493, aggravated battery P.R. Laws Ann. tit. 33, § 4032, art. 404, Controlled Substance law, and violation of articles 4, 6 and 8 of the Puerto Rico Weapons Law. After his incarceration, on March 4, 1988, plaintiff attempted to escape. On May 25, 1989 plaintiff managed to escape confinement and remained a fugitive until February 8, 1991. All charges pertaining to the plaintiff's escape were disregarded by the Superior Court of Puerto Rico under P.R. Laws Ann. tit. 34 app. II, R. 64(n)(5), failure to hold preliminary hearing within 30 days.

On June 26, 1997, the Corrections Classification Committee declined plaintiff's request to be reclassified to minimum security. On September 8, 1997, defendant Gladys

Rivera Correa wrote plaintiff to inform him of the determination of the Classification Committee. She stated the Committee's declination of plaintiff's request for minimum security custody was due in part to the fact that plaintiff had a long sentence and, although charges were dismissed, the Committee could not overlook the fact petitioner had tried to escape once and had been a fugitive for a year and nine months.

Petitioner appealed the Committee's decision to the Puerto Rico Circuit Court of Appeals (San Juan Regional Circuit I- Panel IV) under Case No. KLRA9700628. The court dismissed his petition for judicial review of the Committee's decision as untimely.

Plaintiff spent three and a half years in maximum security after the escape charges were dismissed. He was later transferred to medium security were he has spent the rest of his time up to the present. He alleges he is entitled to a minimum security classification because Administration of Correction Manual OA-87-07, appendix C, Annex I, page 12 (Docket No. 10) states "attempts to escape or escapes from any institution within the last five years will not be taken into account when filling out an inmate's security level evaluation." Plaintiff notes that more than five years have passed since his escape attempt and escape.

On the other hand plaintiff disregards the fact that Administration of Corrections Manual OA-87-07, Appendix C, Annex I, pages 16-17 also contains discretional modification to place a prisoner in a higher level of custody. Among the discretional

modifications that can be taken into account are: "the severity of the crime committed and/or the history of being a continuous threat of escape or trying to escape. For reclassification purposes these attempts or escapes might have occurred over five years from the time of evaluation, since the severity of these attempts or escapes was so high they are taken into account when rendering a final custody level determination."

In short, there is no violation of a federally protected right violated in this case. Thus, there is no civil rights violation.

II. QUALIFIED IMMUNITY

The defendants raise the defense of qualified immunity. Qualified immunity shields government officials who are performing discretionary functions from civil damages as long as their conduct does not violate a clearly established statutory or constitutional right of which he or she should have reasonably known. Febus-Rodríguez v. Betancourt-Lebrón, 14 F.3d 87, 91 (1st Cir. 1994) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); St. Hilaire v. Laconia, 885 F. Supp. 349, 356 (D.N.H. 1995). For a right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Horta v. Sullivan, 4 F.3d 2, 13 (1st Cir. 1993) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

Plaintiff has failed to outline which of his rights were infringed by the defendants' conduct and has also failed to show that such conduct violated clearly established statutory or constitutional rights of which they should have reasonably known.

III. ELEVENTH AMENDMENT

The defendants argue that the Eleventh Amendment to the United States Constitution bars the current complaint against them. The Eleventh Amendment states:

> The jurisdictional power of the United States shall not be construed to extend any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

For the purposes of the Eleventh Amendment, Puerto Rico is afforded the same rights as a state and therefore any private suit against the Commonwealth of Puerto Rico is barred. See, e.g., Ezratty v. Commonwealth of Puerto Rico, 648 F.2d 770, 777 n.7 (1st Cir. 1991).

The Eleventh Amendment applies not only to states but also to state agencies acting as "alter egos" to the state. See Ainsworth Aristocrat Int'l Party, Ltd. v. Tourism Co. of Puerto Rico, 818 F.2d 1034, 1036 (1st Cir. 1987) (quoting Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

There can be equally little doubt that the Administration of Corrections is an alter ego of the Commonwealth of Puerto Rico and therefore certain suits against it are likewise

barred. See, e.g., Will v. Michigan Dep't of Corrections, 491 U.S. 58, 66-68 (1989) (holding that the Michigan equivalent to Puerto Rico's Administration of Corrections is entitled to Eleventh Amendment immunity).

Finally, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself." Will v. Michigan Dep't of State Police, 491 U.S. at 68-69. Defendants argue that at all times the individuals named in the complaint were acting within the scope of their respective offices, in their official capacities, and therefore are immune from suit. It is clear that the defendants acted within the scope of their offices. Thus, no money damages may be paid by the Commonwealth for the acts of its agents. Because the complaint fails to state a cause of action under 42 U.S.C. § 1983, because the defendants are entitled to the defense of qualified immunity, and because the employees of the Corrections Administration are immune from money damages for acts performed in their official capacity, I recommend that the complaint be dismissed.

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections.

Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch v. Massachusetts Elec., 840 F.2d 985 (1st Cir. 1988); Borden v. Secretary of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 14th day of March, 2000.

JUSTO ARENAS
United States Magistrate Judge